IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

IN RE PERS. RESTRAINT OF:
ZACKERY TORRENCE,
PETITIONER,

V.

STATE OF WASHINGTON,
RESPONDENT.

No.56294-4-II

AMENDMENT OF PETITION UNDER RAP 16.8(e)
CONSOLIDATION OF BRIEFS PURSUANT RAP 10.1(g&h)

IDENTITY OF PETITIONER

Mr. Torrence is the petitioner in restraint in the above referenced cause number. Respectfully moves this court for relief as requested below.

REQUEST FOR RELIEF

The petitioner respectfully request this court to allow an amendment of petition under RAP 16.8(e) and consolidate this issue in brief under RAP 10.1 (g & h). Petitioner is timely under the original motion filed and this current supplemental issue under RCW 10.73.090 & RCW 10.73.100.

GROUND FOR RELIEF

The prosecution in Torrence's case suppressed favorable evidence violating due process rights, triggering what we know as a "Brady violation".

The state in this case filed in the Superior Court on 7/3/2018 a memorandum in support of motions In Limine to exclude evidence of prior false statements or bad acts. Suppressing favorable impeachment evidence to Torrence's defense against the state's star witness. See appendix, states motion to exclude evidence.

Because of the suppressed evidence Torrence and defense counsel were barred from impeaching the state's witness on any prior bad act and false statements. The evidence excluded in this case at minimum included at least three acts of theft by the states witness. See 1RP at 55 & 1RP at 349-50. Also emails that the state's witness "A.K.A" told her sister "J.A." about prior sexual abuse by a person other than Mr. Torrence, but that she claimed she had no memory of it. 1RP at 106.

ARGUMENT IN SUPPORT

The suppression by prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment irrespective of good faith or bad faith of the prosecution.

In order to establish a Brady violation, a defendant must establish 3 things: (1) the evidence at issue must be favorable to the accused either because it is exculpatory, or because it is impeaching (2) that evidence must have been suppressed by the state either wilfully or inadvertently; and (3) the evidence must be material. State V. Davila 184, Wh.2d 55 (2015)

"Favorable" Brady evidence includes impeachment evidence as well as exculpatory evidence. Evidence is material under Brady if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. To satisfy this standard, a defendant need not demonstrate by a preponderance that he would have been acquitted had the suppressed evidence been disclosed. Instead, he or she must show only that the governments evidentiary suppression undermines confidence in the outcome of the trial. See State V. Davila, 184 Wh.2d 55 (2015).

Here the state suppressed evidence that should have been otherwise honored for use in this case. Because, specific bad acts evidence is admissible under ER 608(b) for the purpose of attacking or supporting the witness credibility if it's probative of the witness character for truthfulness or untruthfulness or challenging a witness credibility. State V. Arndt, 194 Wh.2d 784, 797-98, 453 P.3d 696 (2019).

Held in, **United States V. Price**, 566 F.3d 900 (9th Cir.2009). The ninth circuit held that the prosecutions star witness's three arrests for theft, as well as a report of theft by deception, would have been admissible under Rule 608(b) to impeach the witness's credibility. Because the jury had no other reason to doubt the witness's testimony, which was crucial, the prosecutor's failure to disclose the witness's criminal conduct was prejudicial.

The same conclusion should apply here in Torrence's case. Finding the state in this case prejudiced the defense by the suppression of the only available impeachment evidence against the state's star witness, "A.K.A".

Defense counsel in this case could have made a much more compelling argument. Impeaching the witness has enough value to make the evidence material and prejudicial to defense if not allowed. Establishing patterns of untruthfulness on a states witness certainly casts doubt upon the jury's conscious and potential fact finding process.

In a recent decision where this court found that the exclusion of evidence violates a defendant's

Constitutional right to present a defense. See State V. Markovich (court of appeals no.81423-1-I/supreme court no.100204-1(2021)).

Markovich court noted: ["Evidence that a defendant seeks to introduce must be of at least minimal relevance." **Jones**, 168 Wn.2d at 720 (quoting State V. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401 a defendant has no Constitutional right to present irrelevant evidence but only minimal logical relevancy is required for evidence to be admissible. **Jones**, 168 Wn.2d at 720; State V. Babb, 44 Wn.App. 803, 814 723 P.2d 512 (1986).

If the proffered evidence is relevant to the defense, the right to present a defense places the burden on the state to show that the evidence is so prejudicial as to disrupt the fairness of the fact finding process at trial. **Darden**, 145 Wn.2d at 622.

The greater the prejudicial effect of the excluded evidence the more likely a reviewing court is to find a Constitutional violation. See **Jones**, 168 Wn.2d at 720-21. For highly probative evidence, "it appears no state interest can be compelling enough to preclude it's introduction consistent with the Sixth Amendment [of the United States Constitution] and [Article 1, section 22 of the Washington Constitution]. Id at 720 (alterations in original)(quoting State V. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).]
Markovich, No.81423-1-I(2021).

The case at hand certainly should make the threshold finding that (1) the evidence at issue here was favorable to the accused Mr. Torrence and it was impeaching, (2) the evidence was suppressed by the state wilfully, see appendix motion In Limine to support and (3) the evidence is material to the defense of Torrence.

Under Clark, this court also held "failing to allow cross examination of a states witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment." State V. Clark, 143 Wn.2d 731, 767.

This case doesn't deviate from the above court of opinions at all. Here we also have a case where the abuse of discretion was by way of the most crucial witness to impeach, with the only evidence available for impeachment being denied.

Because an error of this magnitude is presumed prejudicial, unless this court can conclude the error could not have rationally effected the verdict. State V. DeRyke, 149 Wn.2d 906. It should be recognized that a jury is made up of human beings whose condition of mind cannot be associated by other human beings. Therefore it is impossible for the courts to contemplate the probabilities any evidence may have upon the minds of the jurors. State V. Robinson, 24 Wn.2d 909, 917, 167 P.2d 985 (1946).

This court should find that the state in this case prejudiced the defense of Torrence by the suppression of impeachment evidence. The error which deserves reversal and remand for new trial.

CONCLUSION

For the above mentioned court opinions consistent with the prejudicial effect on the petitioners ability to present a defense. The suppressed evidence by the state in this case should warrant reversal of the ruling and remand for a new trial, with approval to use impeachment evidence under ER 608(b).

Respectfully submitted by:

Dated This 22nd day of November, 2021

Zackery C. Torrence
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520

APPENDIX

8

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs. ZACKERY CHRISTOPHER TORRENCE, Defendant.	NO. 17-1-01632-2 STATE'S MEMORANDUM IN SUPPORT OF MOTIONS *IN LIMINE* TO EXCLUDE EVIDENCE OF PRIOR FALSE STATEMENTS OR BAD ACTS

The State of Washington, through Sr. Deputy Prosecuting Attorney Colin P. Hayes, submits this memorandum in support of its motions *in limine* to exclude prior alleged false statements and bad acts by the victim.

ARGUMENT

I. THE COURT SHOULD GRANT THE STATE'S MOTION TO EXCLUDE ANY ALLEGED PRIOR FALSE STATEMENTS OR BAD ACTS.

The Court should grant the State's motion to exclude evidence because any prior false statements or bad acts are remote in time and have no relevance in this trial. The decision to admit or exclude evidence lies within the sound discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); *State v. Moran*, 119 Wn. App. 197, 218, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032 (2004).

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A victim's prior misconduct usually is irrelevant to defenses other than self-defense. 5D Karl B. Tegland, Washington Practice, Courtroom Handbook on Washington Evidence, § 405:7, at 206 (2017-2018 ed., October 2017); *e.g., State v. Safford,* 24 Wn. App. 783, 791-2, 604 P.2d 980, 985 (1979) (trial court properly excluded evidence bearing on the victim's character when the only defense was that the incident occurred by accident or mistake). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b).

If offered, evidence of a general character trait must be in the form of reputation evidence. ER 404(a)(2); ER 405(a). Under ER 405(b), "character may be proved by evidence of specific instances of conduct, but only in the relatively unusual case in which 'character or a trait of character of a person is an essential element of a charge, claim, or defense.'" 5D Karl B. Tegland, *supra.*, § 405:5, at 204-05; ER 405(b).

> Rule 405 specified the acceptable methods of proving character, assuming the character of a party or a victim is admissible under Rule 404(a). Rule 405 applies only to proof of general character; it does not apply to proof of more specific instances of conduct when specific instances are admissible under Rule 404(b). The Washington drafters deleted provisions in the corresponding federal rule that permit proof of character by testimony in the form of an opinion. Thus, the Washington version of Rule 405 reflects the more traditional common-law rule that proof of character is limited to testimony concerning reputation.

5D Karl B. Tegland, *supra.*, § 405:1, at 202.

Under ER 404(a) and ER 405, the appropriate method of presenting character trait evidence has been long established in the State of Washington and is set out in *State. v. Argentieri*, 105 Wash. 7, 177 P. 690 (1919). 5D Karl B. Tegland, *supra*, § 405.2, at 203.

> The orderly and proper way to put in evidence of this sort, after the witness has testified to acquaintanceship with the defendant not too remote in point of time, is to

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> have the witness answer no or yes, as the fact is, to the question, and if he knows what the general reputation of the defendant is, in the community in which he resides, for the particular trait of character (naming it) that is relevant to and involved in the crime for which the defendant is charged. If the witness answers no, that ends the inquiry. If the witness answers yes, then the next and final question should be, "What is it, good or bad?"

Argentieri, 105 Wash. at 10.

To be admissible, the reputation of a victim or witness must be shown to exist within a "neutral and generalized community." 5D Karl B. Tegland, *supra*, § 405.2, at 203, citing *State v. Callahan*, 87 Wn. App. 925, 934–36, 943 P.2d 676, 681–82 (1997) (assault victim's reputation among law enforcement officers held inadmissible, but defendant's workplace community reputation admissible), and *State v. Thach*, 126 Wn. App. 297, 315, 106 P.3d 782, 791-92 (2005) (defendant's reputation among family members inadmissible; a family is not neutral or generalized enough to be classified as a community). Furthermore, the reputation must be relevant in the sense it must not be too remote in time and the trial court has considerable discretion in this regard. *State v. Riggs*, 32 Wn.2d 281, 283-85, 201 P.2d 219, 220-21 (1949); *see State v. Lord*, 117 Wn.2d 829, 873, 874-75, 822 P.2d 177, 202-04 (1991) (reputation testimony regarding period several months earlier held too remote in time), *overruled on other grounds by State v. Schierman*, __ Wn.2d ___, 415 P.3d 106, 172 n54 (2018); *State v. Gregory*, 158 Wn.2d 759, 805, 147 P.3d 1201, 1226 (2006), *as corrected* (Dec. 22, 2006) (reputation evidence based on knowledge obtained several years prior to trial held too remote in time to be relevant), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 768–69, 336 P.3d 1134, 1139–40 (2014).

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In *State v. Lord*, the Washington Supreme Court explained the applicability of ER 608(a):

> The application of ER 608(a) has been broken down into five elements:
>
> > The first element is the foundation for the testimony—the knowledge of the reputation of the witness attacked. Second, the impeaching testimony must be limited to the witness's reputation for truth and veracity and may not relate to the witness's general, overall reputation. Third, the questions must be confined to the reputation of the witness in his community ... Fourth, the reputation at issue must not be remote in time from the time of the trial. Finally, the belief of the witness must be based upon the reputation to which he has testified and not upon his individual opinion.
>
> (Footnotes omitted.) 5A K. Tegland, Wash.Prac., *Evidence* § 231, at 202–04 (3d ed. 1989).

117 Wn.2d at 874-75.

"A witness offering reputation testimony must lay a foundation establishing that the subject's reputation is based on perceptions in the community. ER 608(a). Personal opinion is not sufficient." *State v. Callahan*, 87 Wn. App. 925, 935, 943 P.2d 676, 682 (1997), citing *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678, 681 (1993), and comment to ER 608. Moreover, in *State v. Gregory*, the Washington Supreme Court evaluated proposed reputation evidence under ER 608(a) and opined that a family typically does not constitute a neutral group, a family typically does not constitute a "community," a group of only two people cannot constitute a "community," and reputation evidence several months old is too remote in time for admission. 158 Wn.2d at 804-05.

Additionally, a witness may not provide an opinion on another witness's credibility. *E.g., State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999, 1002-03 (1995); *Thach*, 126 Wn. App. at 312; *State v. Perez-Valdez*, 172 Wn.2d 808, 817, 265 P.3d 853, 857 (2011), citing *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267, 274

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(2008); *cf.*, *State v. Boehning*, 127 Wn. App. 511, 524-25, 111 P.3d 899, 906 (2005) (asking one witness whether another witness is lying is flagrant misconduct; in child sex case, prosecutor committed misconduct by asking defendant if victim "made [it all] up" for "no reason."); *State v. Alexander*, 64 Wn. App. 147, 152-54, 822 P.2d 1250, 1253-55 (1992) (in prosecution for child rape, prosecutor should not have been allowed to ask victim's counselor whether the victim gave "consistent" disclosures of the abuse or gave any indication of lying about the abuse).

In this case, any proffered reputation evidence is not admissible under ER 404, ER 405, or ER 608 because a reputation does not exist among a neutral and generalized community and, even if it did, it would be too remote in time to be relevant.

Similarly, the Court should exclude or limit evidence of prior false statements or bad acts by the victim under ER 608(b) because any such evidence is remote in time, has no relevance, and pertains to collateral issues. Under Rule 608(b), specific instances of a witness's conduct may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination," but the specific acts may not be proved by extrinsic evidence. The cross-examiner must have a good faith basis for the inquiry and the court may require that the basis be revealed in the absence of the jury before cross-examination is allowed. 5D Karl B. Tegland, *supra*, § 608:9, at 290; *e.g.*, *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747, 784 (1994) (prosecutor should not have asked defense witness about prior bad act where prosecution had no basis for asking the question).

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Also, "[u]der ER 608, evidence of prior misconduct is admissible only if probative of a witness's character for truthfulness." *State v. Stockton*, 91 Wn. App. 35, 42, 955 P.2d 805, 809 (1998).

> Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment. *State v. York*, 28 Wash.App. 33, 621 P.2d 784 (1980). The need for cross-examination on misconduct diminishes with the significance of the witness in the state's case. *State v. Robinson*, 44 Wash.App. 611, 622, 722 P.2d 1379 (1986). Once impeached, there is less need for further impeachment on cross. *State v. Martinez*, 38 Wash.App. 421, 424, 685 P.2d 650 (1984).

State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006, 1024 (2001). However, a trial court properly excludes evidence of prior misconduct under ER 608(b) when the misconduct is remote in time. *See, e.g., State v. McSorley*, 128 Wn. App. 598, 613-14, 116 P.3d 431, 439 (2005).

The Washington Supreme Court has recognized that limits exist on defense cross-examination under ER 607 and 608:

> Although the law allows cross-examination into matters which will affect the credibility of a witness by showing bias, ill will, interest or corruption (3 Wigmore on Evidence (3d ed., 1940) s 943, et seq.), the evidence sought to be elicited must be material and relevant to the matters sought to be proved and specific enough to be free from vagueness; otherwise, all manner of argumentative and speculative evidence will be adduced. Defendant's offer of proof referring to no specific acts, conduct or statements on the part of the witness, but vaguely tending to show bias in the most indefinite and speculative way, appears too remote to meet the purpose for which it was offered, and the trial court properly held it to be immaterial and irrelevant (Dods v. Harrison, 51 Wash.2d 446, 319 P.2d 558 (1957)); the proffered evidence seems to fall within the established rule that a witness cannot be impeached on matters collateral to the principal issues being tried. Good v. West Seattle General Hospital Corp., 53 Wash.2d 617, 335 P.2d 590 (1959).

State v. Jones, 67 Wn.2d 506, 512-13, 408 P.2d 247, 251-52 (1965).

"It is a well recognized and firmly established rule in this jurisdiction, and elsewhere, that a witness cannot be impeached upon matters collateral to the principal

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issues being tried." *State v. Oswalt*, 62 Wn.2d 118, 120, 381 P.2d 617, 618 (1963) (citations not included); *State v. Nolon*, 129 Wash. 284, 289, 224 P. 932, 934 (1924) ("The rule is well settled that a witness cannot be impeached by showing the falsity of his testimony concerning facts collateral to the issue."). This rule exists to avoid undue confusion of issues and prevent an unfair advantage over a witness unprepared to answer concerning matters unrelated or remote to the issues at hand. *Oswalt*, 62 Wn.2d at 121, citing *State v. Fairfax*, 42 Wn.2d 777, 258 P.2d 1212 (2002). A matter is collateral if the evidence is not admissible for any purpose independent of contradiction. *Id.*; *State v. Sandros*, 186 Wash. 438, 444, 58 P.2d 362, 365 (1936). In the present case, evidence regarding alleged false statements or bad acts by the victim constitutes collateral matters.

Nonetheless, if admitted under ER 608(b), the specific instance of conduct offered to demonstrate a lack of credibility cannot be proved by extrinsic evidence. ER 608(b). Thus, if inquiry is allowed under ER 608(b) and the witness denies the specific instance of conduct, the inquiry is at an end. *State v. Barnes*, 54 Wn. App. 536, 540, 774 P.2d 547, 549 (1989). The cross-examiner must accept the answer of the witness and may not call a second witness to contradict the first witness. *Id.*

Here, even if the defense can establish that the victim has made past false statements or committed bad acts, these have minimal relevance due to the passage of time and the victim's age at the time of commission. Extrinsic evidence regarding any prior false statements will create a trial within a trial and thus should be excluded under ER 403 as a waste of time.

CONCLUSION

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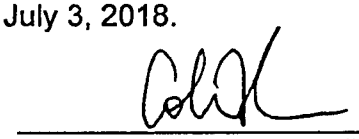
For these reasons outlined above, the State respectfully requests that the Court grant the State's motion to exclude evidence of prior alleged false statements or bad acts.

DATED this July 3, 2018.



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs. ZACKERY CHRISTOPHER TORRENCE, Defendant.	NO. 17-1-01632-2 STATE'S SUPPLEMENTAL MOTIONS *IN LIMINE*

The State of Washington, by and through Sr. Deputy Prosecuting Attorney Colin P. Hayes, makes the following supplemental motions *in limine* :

1. No mention that Brian and Savanah Alexandar ran "background checks" on any of Laura Alexandar's boyfriends, including the Defendant. ER 402, 403.

2. No mention that Laura Alexandar remarked to Anne Schienle that Laura was "going to get him," referring to the Defendant, right after the Defendant was arrested and went to jail for domestic violence against Laura. ER 402, 403, 404(b). In the pretrial interview Anne Schienle, she alleges Laura made this statement between the time of A.A.'s second and third visit to the residence of Laura and the Defendant in Vancouver. There is no factual nexus between this statement and A.A.'s disclosure in late 2016; these events are separated by over six years in time. Further, Laura and the Defendant continued to date for months after this remark was made. Additionally, this line of

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questioning opens the door to the reason for Laura's anger at the time of the statement; i.e., the domestic violence perpetrated by the Defendant.

3. No mention that Brian Alexandar had a "code word" with A.A. and her younger sister to say to Brian on the phone during visits with Laura in case of any dangerous situations at Laura's house. ER 402, 403. Instead, defense simply can elicit that A.A. spoke with Brian on the phone during visits, A.A. had the opportunity to disclose any abuse, and A.A. did not disclose anything about the Defendant.

4. No questioning about whether A.A. was ever sexually abused by a prior boyfriend of Laura Alexandar. ER 402, 403. A.A. would testify that she has no recollection of being sexually abused by anyone before the Defendant.

DATED this July 8, 2018.

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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Zacker? Torrence, declare and say:

That on the 22 day of NOVember, 20 21 I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 56294-4-II:

1-Motion to Amend personal Restraint Petition and Consolidate issues.;

;

.

addressed to the following:

Court of Appeals
Division Two
909 A street, Ste 200
Tacoma WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 22 day of NOVember, 20 21, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

Zack Torrence
Print Name

DOC 355318 UNIT H1
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